

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

73-2504

To be argued by
WILLIAM EPSTEIN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
WILLIAM STANBRIDGE,

Appellee, Cross-Appellant,

-against-

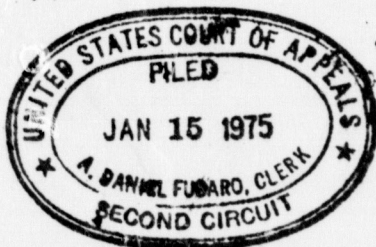
JOHN R. ZELKER, Superintendent,
et al.,

Appellants, Cross-Appellees.

Docket No. 73-2504

BRIEF FOR APPELLEE, CROSS-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
GRANTING IN PART AND DENYING IN PART A PETITION
FOR WRIT OF HABEAS CORPUS



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QUESTIONS PRESENTED

1. Whether the introduction into evidence of a confession made by a co-defendant violated petitioner's rights under Bruton v. United States, 391 U.S. 123 (1968).
2. Whether petitioner's confession was the product of coercive circumstances, and therefore involuntary.

3. Whether petitioner's confession was the product of an illegal arrest.

4. Whether petitioner's car was seized in violation of the Fourth Amendment, rendering erroneous the admission into evidence of photographs taken of the car and the bloodstained rear seat.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by the State from so much of an order of the United States District Court for the Eastern District of New York (Mishler, Ch.J.) dated July 30, 1973, granting in part petitioner's application for a writ of habeas corpus, and an appeal by petitioner from so much of the same order denying in part his application.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

Petitioner was convicted on January 5, 1962, in Supreme

Court, Nassau County (Gulotta, J.) of first degree manslaughter,* first degree grand larceny, two counts of first degree assault, and two counts of second degree assault. He was sentenced to imprisonment for a term of thirty-five to seventy years.

On appeal, the Appellate Division remanded the case for a hearing on the voluntariness of the confessions of petitioner and co-defendants Robert Moll and John Closter, pursuant to Jackson v. Denno, 378 U.S. 368 (1964). (People v. Moll, 22 A.D.2d 921 (2d Dept. 1964)). The voluntariness hearing, conducted pursuant to the standards of People v. Huntley, 15 N.Y. 2d 72 (1965), resulted in a finding by Judge Gulotta that all three confessions were voluntary beyond a reasonable doubt. The case was then returned to the Appellate Division, which affirmed the judgment except insofar as it reduced the sentence as to petitioner to a term of from twenty-five to fifty years. (People v. Moll, 26 A.D.2d 654 (1966)).

The New York Court of Appeals then affirmed (People v. Moll, 21 N.Y.2d 706 (1967)), with Chief Judge Fuld and Judge Burke dissenting on the grounds that the all-night interrogation and police brutality procured the confessions in violation of the defendants' constitutional rights. Petitioner thereafter made a motion that the Court of Appeals amend its remittitur to reflect the fact that the tribunal had passed upon the constitu-

*Petitioner was indicted for murder in the death of Officer Coote. The jury was charged on first degree murder, common law murder, felony murder, and first degree manslaughter.

tional issues involved. The motion was granted (21 N.Y.2d 794 (1968)).

The Supreme Court of the United States thereafter granted certiorari, and vacated and remanded the case for further consideration in light of Bruton v. United States, 391 U.S. 123 (1968) (Stanbridge v. New York, 395 U.S. 709 (1970)). Upon reargument in the Court of Appeals, the conviction was unanimously affirmed (People v. Moll, 26 N.Y.2d 1 (1970)). Certiorari was denied (Stanbridge v. New York, 398 U.S. 911 (1970)).

B. The Trial and Voluntariness Hearing

Petitioner, along with Moll and Closter, was charged with the armed robbery of a Manhasset, Long Island, Food Fair Supermarket, and with the killing of Nassau County Patrolman John Coote.

The proof was that on March 33, 1961, at approximately 6:30 p.m., the three youths, after parking petitioner's green 1955 customized Chevrolet hotrod on a side street adjacent to a shopping center parking lot, donned masks and entered the rear door of the supermarket. Moll carried a sawed-off shotgun, and alleged that the two others were armed with real handguns.* Petitioner claimed that he carried only a thirty-nine

*None of the defendants testified, but confessions of each were read or related to the jury. See statements of defendant Moll, Peoples' Exhibits 28 (1744-1746) and 37 (1750-1760).

Numerals in parentheses refer to pages of the trial transcript.

cent toy plastic pistol, that Closter was unarmed, and that he was unaware that Moll had the shotgun or any other dangerous weapon.* Closter maintained that he was unarmed, that he was aware of Moll's weapon, and that petitioner carried a toy gun.** The supermarket employees were tied up and robbed and the store safe robbed.***

As they were leaving the supermarket, Moll, Closter, and petitioner were surprised by Officer Coote who, gun in hand, ordered the three to halt. According to petitioner and Closter, the two of them dropped their bags of money and raised their hands in surrender. Moll, however, fired both barrels of the shotgun, killing the officer. Moll alone maintained that one of the other two, when asked what to do, assented to the shooting.****

Following the shooting, a large team of Nassau County detectives began searching for the three young men, following the lead of several witnesses who had described the unusual car.*****

*See statements of defendant Stanbridge, Peoples' Exhibits 22 (1714-1718) and 23 (1719-1738).

**Closter's oral admissions were related to the jury by Captain of Detectives John Cummings (777-783).

***See the testimony of store manager Raymond Tichelaar (149-163) and assistant store manager Frank Gagliardi (175-179).

****See the testimony of Ildo Ruiz, in whom Moll confided after the shooting (823-824).

*****See the testimony of Alexander MacLean (211-220), Gail Collins (262-264), William Bickell (287-291), and William Pusey (449-454).

The intense search led to the home of Robert Collins, a teenager who owned a similar car (H:548*). He informed the detectives that petitioner had a car which fit the description of the getaway vehicle (H:552). Collins, in the company of his father, Hugh Collins, then a New York City homicide detective cooperating with the Nassau County force (H:511-544), led Nassau County Detectives Leo Ferrandiz, Daniel Cavanaugh, and Gerald Higgins to petitioner's house, which they reached about 11:30 p.m. (558, 574). On orders from the detectives, Collins motioned petitioner, who was standing at the window, to come down (H:554). Petitioner emerged from the house, was taken into custody, and placed in the back seat of the detectives' car. Ferrandiz maintained that petitioner "agreed" to go along, but admitted that petitioner would have been detained regardless of his disposition to accompany the detectives (559-560). Petitioner insisted that he was physically forced into the car without any choice in the matter (H:55).

Once petitioner was in the car, the detectives ordered him to take them to his green hotrod, the suspected getaway car (H: 57; 560-562). Petitioner directed the detectives to a private garage several blocks away where the car was parked. At the garage the keys were taken from petitioner and the car searched, bloodstains being found on the rear seat of the car (H:408-413).

*Numerals in parentheses preceded by "H" refer to pages of the transcript of the Huntley hearing on the voluntariness of the three confessions.

At that point Ferrandiz and Higgins drove petitioner to the Roslyn station house while Cavanaugh followed in petitioner's car (H:414).

Petitioner and the detectives reached the station house about 12:30 a.m. Petitioner was taken to an office on the first floor (568). There, he was interrogated ceaselessly by different teams of detectives until about 2:30 a.m., when he was moved to another room on the second floor. The interrogation continued until about 8:00 a.m. when petitioner, having previously denied complicity in the crimes, confessed to his involvement after being confronted with the confessions of Closter and Moll, the two other suspects having been apprehended during the early morning hours of March 23, 1961, following petitioner's detention (497-498). During the time between his detention at 11:30 p.m. on March 22 and his confession at 8:00 a.m. the following morning, petitioner, going without sleep, food, or the advice of friend or counsel, was interrogated and guarded at various times by the three arresting detectives, Ferrandiz (558-568), Cavanaugh (573-581), and Higgins (583-587), and by Detective Timothy Hushion (487-501), Chief of Detectives Stuyvesant Pinnell (512-521), Assistant Chief Inspector James Farrell (520-521), Deputy Chief Inspector John Lada (526-529), Captain of Detectives John Cummings (534-538), Detective Robert Rolfheart (541-542), Lieutenant Frank O'Shea (545-555), Detective Peter DeMarco (590-596), Detective John Skuzenski (597-606), and Detective Jacques Serroen (608-609),

as well as possible others.

Following his confession to Detective Hushion, petitioner was interrogated by then-Assistant District Attorneys Cahn, Lewis, and Delin, who had been present at the precinct throughout the night but had not advised petitioner of his rights or otherwise assisted petitioner (H:942-943). After his formal question-and-answer confession to Cahn, petitioner was officially "arrested."

The confessions of petitioner, Moll, and Closter differed as to certain details, some of which related to petitioner's culpability in the killing of Officer Coote. Petitioner maintained that he carried only a thirty-nine cent toy plastic pistol, that Closter was unarmed, that he was unaware that Moll carried a shotgun or any other dangerous weapon, and that he raised his hands to surrender as soon as he saw Patrolman Coote. Closter stated that petitioner had a toy gun, that he himself was unarmed, and that Moll carried a small, sawed-off shotgun vertically at his side. Moll, on the other hand, maintained that petitioner had a real gun and that the shotgun was loaded outside the supermarket, impliedly in the presence of petitioner and Closter.

At the trial none of the defendants testified, but all three interview statements were admitted into evidence, as were the narrative confessions of petitioner and Moll. In addition, one Ildo Ruiz testified as to admissions by Moll which may have further inculpated petitioner. According to Ruiz, Moll told

him that when the three defendants were stopped by the police officer, "[Moll] turned around and he asked one of the other two guys if he should, and somebody said, 'Yeah,' one of the other two guys.... And he turned around and shot the officer" (823-824). Ruiz testified further that Moll "said that it was a sawed-off shotgun which he used and one of the other two fellows had a revolver that had the pin, the firing pin was no good so it couldn't shoot.... And another one had a .32 stub-nose" (828).

The jury found Robert Moll guilty of felony murder, with a recommendation that the death penalty not be imposed, and also guilty of second degree murder, robbery, larceny, and assault charges (1650). Stanbridge and Closer were found not guilty of felony murder, but guilty of manslaughter in the first degree and of robbery, larceny, and assault charges (1651).

At the January 1965 Huntley hearing the three defendants testified at length, maintaining that their confessions were the product of physical violence. Corroborating petitioner's claim of violence were attorneys Graham Schneider (H:29-37), Michael Cairo (H:51-52), and Michael DiRenzo (H:289-290), who testified they saw bruises on petitioner between March 23 and March 28, 1961. To counter petitioner's claim of violence, the State relied upon the evidence given by the detectives at the earlier trial and the testimony of numerous employees of the Nassau County Jail, where petitioner was taken on March 23, 1961. They all denied seeing any bruises.

Following the Huntley hearing, Judge Gulotta ruled that the confessions had been voluntary.

C. The Present Case

In his petition to the District Court, petitioner urged that the admission into evidence of the statements of his co-defendants violated his Sixth Amendment rights under Bruton v. United States, 391 U.S. 123 (1968); Roberts v. Russell, 392 U.S. 293 (1968); that, under the totality of the circumstances, his confession was involuntary; that his confession was the product of an illegal arrest; and that his car had been illegally seized, thereby tainting photographs of the car and the bloodstained rear seat, both of which were introduced into evidence at trial.

Judge Mishler agreed with petitioner's argument that Bruton had been violated, holding that, since only Moll's confession intimated that petitioner was aware that Moll had a shotgun, petitioner could not be convicted as an aider and abetter to a manslaughter charge. The petition was otherwise denied.

ARGUMENT

I

THE INTRODUCTION INTO EVIDENCE OF
CO-DEFENDANT MOLL'S CONFESSION VIO-
LATED PETITIONER'S RIGHTS UNDER
BRUTON v. UNITED STATES, 391 U.S.
123 (1968).

The State's proof was that Moll killed Officer Coote with two shotgun blasts, but that petitioner and Closter took no active part in the shooting. Thus, the State's theory of petitioner's guilt was that petitioner aided and abetted Moll. To establish petitioner's role as an aider and abetter to Moll, the State had to show that petitioner aided and abetted an assault with a deadly weapon which resulted in death.* The only evidence of these required elements was co-defendant Moll's statements implicating petitioner. These statements, as Judge Mishler found, were inadmissible under Bruton v. United States, 391 U.S. 123 (1968), and Roberts v. Russell, 392 U.S. 293 (1968).

The State's only evidence about the shooting was the three confessions of petitioner, Closter, and Moll, and the testimony

*Petitioner was indicted for murder. The jury was charged on murder, felony murder, and manslaughter.

of Ildo Ruiz, in whom Moll had confided after the shooting. Petitioner's confession was that he carried only a thirty-nine cent toy plastic pistol, that he did not know Moll had a sawed-off shotgun or any other dangerous weapon,* that he threw up his hands to surrender when confronted by Officer Coote, and that the shooting took him by surprise.

*Despite intense pressure by Assistant District Attorney Cahn, petitioner was adamant that he was unaware of Moll's shotgun:

Q [by Cahn]. Well, now Bobby tells us his hand was burned from the shotgun shot and Johnny tells us about a shotgun and the gun that you had, and do you honestly want me to believe that you didn't see anything in their hand?

A. I didn't look at their hands at all. The woolen pieces went in your eyes. You couldn't see out. Because I was trying to look through one.

Q. You saw well enough to take the money.

A. Oh, yes, I could out of one eye.

Q. That one eye could see a great deal.

A. I know, but you see the whole thing was I wasn't looking down at their hands or anything where Bobby was.

Q. Yes, I understand that.

A. Because Bobby was in the back all the time.

Q. But don't you think -- have you cooperated now?

A. I cooperated with the chief.

Q. Yes, you did, but when you cooperate don't you think you should go all the way? I

Closter's partial confession substantially corroborated petitioner's version of the facts. He related that petitioner

[Footnote continued]

mean, if you were in my position, Mr. Stanbridge, would you honestly -- tell me honestly, would you honestly believe the story that you didn't see anything in their hands? Now, tell me the truth.

A. It's a fifty-fifty possibility. I take it like that. That's the way I would take it.

(1730).

Q. What did [Moll] have in [his] hand?

A. I didn't look. His hand was straight down. I swear to my mother it was straight down.

Q. It wasn't straight down when you walked into the store?

A. He was in back of me.

Q. Didn't he have the shotgun with him then?

A. I didn't see it at the time.

Q. When did you see it?

A. I didn't. All I heard was the shot.

Q. You said you didn't see it at the time. When did you see it, Mr. Stanbridge?

A. I never saw it.

Q. That's not the truth.

A. It is, because when we were down there when I was standing in back of them and I came over, when I started to walk toward the policeman when he called me over all I saw was the fire come out and it came

carried a toy gun, that he himself was unarmed, and that Moll carried the small, sawed-off shotgun secreted vertically at

[Footnote continued]

from over by Bobby, and you couldn't see anything in his hand, like something was in it. I don't know.

Q. Mr. Stanbridge, I'm not asking you to describe it. What was it?

A. It was the shotgun.

Q. How do you know?

A. It had to be. I don't know it was a shotgun, so I know it had to be. It made a lot of noise and everything.

Q. Yes, it did, but when did you first see the shotgun? Would you care for a cigarette?

A. No, I don't smoke.

Q. When did you first see the shotgun?

A. The only time I saw this here [was] when I saw it down by the policeman down by the fence.

Q. The first time you saw it? That was the first time you saw it?

A. The only time I saw it. I saw him holding something in his hands and I saw the fire come out.

(1732-1733).

Q. Now, you tell me you did not see that shotgun in the supermarket.

A. I swear to God I didn't see it in the supermarket.

Q. When Bobby got in the car at the bowling alleys you didn't see him get in

his side rather than brandishing it in front of him (1781).

Moll's confession and his statements to Ruiz contradict petitioner's and Closter's statements on several important

[Footnote concluded]

the car with the shotgun?

A. He didn't have nothing. When he came in he had a three-quarter coat on. I know he has a black three-quarter coat and he didn't have nothing in his hands. I didn't see nothing in John's hands, but when we was going out there they had a bag. It could have been under the coat, for all I know. There is where it had to be, under the coat.

(1734).

Q. ... So what I am getting at is what you want me to believe was that you in so far as you were concerned you were going to hold up the Food Fair based on your toy pistol and that was all, the only weapon?

A. Yes, I guess so.

Q. You were going to take that chance?

A. Yes. That's why I was scared. I figured the guy would see the plastic gun and he would hit me over the head with something. That is what I said. "Bobby," I said, "Bobby and John, I'm just scared."

Q. What did they say?

A. They just laughed.

Q. Didn't they show you the shotgun at that time?

A. No, I didn't see it until the policeman was killed.

(1737-1738).

points. Moll told the police that petitioner had a real pistol (1744, 1752), that Moll loaded the shotgun outside the supermarket (1755), that the three defendants waited outside the store until one of the employees left, and that the robbery commenced when Moll, brandishing his sawed-off shotgun, ordered that employee back into the store (1755).

Witness Ildo Ruiz testified that Moll described to him the weapons at the scene of the robbery.

He said it was a sawed-off shotgun which he used and one of the other two fellows had a revolver that had the pin, the firing pin was no good so it couldn't shoot.... And another one had a .32, snub nose.

(828).

Ruiz also testified that Moll told him that as the three defendants were fleeing from the supermarket they were met by a policeman:

He told me that they were running and the officer said "Stop," and as they made a turn or something like that, the officer couldn't see the shotgun because he was holding it in front of him, and the officer was in back....

And he said that he turned around and he asked one of the other two guys if he should, and somebody said "Yeah," one of the other two guys....

He said that one of the other two guys said "Yeah"....

And he turned around and shot the officer.

(823-824).

Thus, the confessions in this case were not, as the State argues (Brief at 32), "almost identical," People v. McNeil, 24

N.Y.2d 550 (1969), or "interlocking," United States ex rel. Cantanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), cert. denied, 397 U.S. 942 (1970). Particularly, the confessions differ on the critical questions of whether petitioner was aware that Moll had a shotgun and whether Moll consulted his confederates before shooting the policeman.

Without Moll's statements that petitioner was aware of the shotgun and that he gave his assent to the shooting, there was insufficient evidence to convict petitioner of first degree manslaughter which, under §1050 of the former New York Penal Law,* required, in this case, the use of a dangerous weapon. Since petitioner did not shoot the officer, he could be guilty of first degree manslaughter only as an aider and abetter, which would require petitioner to "share the intent or purpose of the principal actor" and join in a "community of purpose." People v. LaBelle, 18 N.Y.2d 405, 412 (1966); cf., United States v. Steward, 451 F.2d 1203 (2d Cir. 1971).

As Judge Mishler recognized below, petitioner could not have shared Moll's purpose if he lacked knowledge that Moll carried a dangerous weapon, and the only evidence indicating

*Former New York Penal Law, §1050, provided:

Such homicide is manslaughter in the first degree when committed without a design to effect death:

(2) In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.

petitioner had such knowledge was found in Moll's confessions:

Without Moll's statements, there would be no evidence that petitioner knew that anyone had or planned to use a dangerous weapon.
...

... [A]n agreement "to commit assaults" must be one to commit assaults with dangerous weapons in order to be an element of first degree manslaughter....

Memorandum of Decision and Order, July 30, 1973, at 7.
Emphasis in the original.

The requirement that petitioner have knowledge of Moll's possession of a dangerous weapon is, contrary to the State's assertion (Brief at 30), required by New York law. People v. Monaco, 14 N.Y.2d 43 (1964). As Judge Mishler observed in the Monaco case:

... In Monaco the co-defendant, Fasano, actually shot the victim, and the court found that the record would sustain a finding that the defendant, Monaco, knew the gun was carried and was loaded. Against this factual background, the court held that

"[the record] would sustain a conviction for manslaughter, first degree (under Penal Law, §1050, subd. 1 [sic]) for it could be found as a matter of law that Monaco, with Fasano, was engaged in a plan to assault the deceased and that homicide without design by Monaco to effect death resulted [citation omitted]." People v. Monaco, 14 N.Y.2d 43, 47, 248 N.Y.S.2d 41, 45 (1964).

Memorandum of Decision and Order, July 30, 1973, at 8.
Emphasis in the original.

Thus, since the only evidence indicating that petitioner was aware of Moll's shotgun was to be found in Moll's confes-

sions -- confessions inadmissible under Bruton -- Judge Mishler correctly concluded that the first degree manslaughter conviction was improper:

... [I]n order for petitioner as an aider and abetter to be guilty of first degree manslaughter under the second alternative of section 1050(2), he must have agreed to commit an assault with a dangerous weapon but without intent to kill. Since there was no such evidence in petitioner's trial aside from Moll's statements, petitioner's conviction for first degree manslaughter must be vacated.

Memorandum of Decision and
Order, July 30, 1973, at 8.
Emphasis in the original.

The State argues (Brief at 32-36) that even if Moll's confessions were introduced into evidence against petitioner in violation of Bruton, the error was cured when, at the February 1965 Huntley hearing, held three years after the jury trial, petitioner's counsel had an opportunity to cross-examine Moll and Closter. This argument is laughable.

At the commencement of the Huntley hearing, Judge Gulotta made perfectly clear that only the voluntariness of the confessions, and not their truth, was at issue:

Since the only issue before me on this hearing is the question of voluntariness or involuntariness of the confessions, I shall limit the testimony on this new hearing to that specific question alone.

(H:19).

Thus, petitioner's counsel never had an opportunity to test the veracity of Moll's confession. Moreover, regardless of

the questions posed at the Huntley hearing, there was no opportunity to cross-examine Moll in front of the jury which passed upon petitioner's guilt. Judge Mishler correctly ruled:

...[T]he denial of the sixth amendment right of confrontation cannot be cured by an opportunity to cross-examine a confessing co-defendant at a Huntley hearing, where the sole issue to be determined is the voluntariness and not the truth thereof, and this opportunity is not available until over three years after the jury has returned its verdict.

Memorandum of Decision and
Order, July 30, 1973, at 4-
5. Emphasis in the original.

II

PETITIONER'S CONFESSION WAS THE PRODUCT OF COERCIVE CIRCUMSTANCES AND WAS THEREFORE INVOLUNTARY.

At approximately 11:30 p.m. on March 22, 1961, Nassau County Detectives Leo Ferrandiz, Daniel Cavanaugh, and Gerald Higgins, acting on information connecting petitioner with the car seen at the scene of the robbery and shooting, took petitioner into custody as petitioner came out of his house (558, 574). According to Ferrandiz, petitioner "agreed" to accompany the detectives (559), but Ferrandiz admitted that, had petitioner not agreed, he would have been forcibly taken into the detectives' car (560). Petitioner, on the other hand, claimed he was physically forced into the detectives' car without any choice (H:55-56). Thus, whether Ferrandiz' or petitioner's version of petitioner's seizure is accepted, it is clear that because the detectives believed petitioner was a prime suspect they took him into custody for the purpose of interrogation.

After petitioner was frisked, he was taken by the detectives to a private garage a mile away from his home, where his customized car, suspected of being the car used during the crime, was parked (H:408). There the detectives seized petitioner's keys and examined the car (408-413). Thereupon, they drove petitioner to the station house, Detective Cavanaugh following in petitioner's car (H:414).

During the drive from petitioner's home to the garage and from the garage to the precinct, petitioner was questioned by the detectives (587, H:407). He was taken to the precinct at approximately 12:30 to 1:00 a.m. on March 23, 1961.

At the Roslyn, New York, station house, he was intensively interrogated by numerous detectives from 12:30 or 1:00 a.m. until 8:00 a.m. when, after being confronted with Closter's confession, petitioner admitted his guilt. At least ten detectives participated in the interrogation and guarding of petitioner: (1) Cavanaugh, who stayed with him for an hour after the arrival at the precinct; (2) Detective Timothy Hushion, who first saw petitioner at 1:00 a.m. being questioned by Cavanaugh and O'Shea, and questioned petitioner four or five additional times during the night, and then took petitioner's formal confession at 8:00 a.m. (473-501); (3) Chief of Detectives Stuyvesant Pinnell, who participated in the questioning with Detectives O'Shea and Cummings, at about 1:00 a.m. and returned from time to time during the night (512-521); (4) Assistant Chief Inspector James Farrell, who interrogated petitioner with Cummings and other detectives between 2:00 and 3:00 a.m. (520-521); (5) Deputy Chief Inspector John Lada, who saw petitioner throughout the night and participated in the 8:00 a.m. interrogation (526-529); (6) Captain of Detectives John Cummings, who interrogated petitioner at 2:00 a.m. in an office on the ground floor of the precinct house and later in a room on the second floor where petitioner was subsequently moved (534-538);

(7) Lieutenant Frank O'Shea, who questioned petitioner at 2:15 a.m. and later at 6:00 a.m. with Farrell (545-555); (8) Detective Peter DeMarco, who questioned and guarded petitioner from 4:30 to 6:00 a.m. (590-596); (9) Detective John Skuzenski, who questioned petitioner from 2:30 to 3:30 a.m. and who moved petitioner upstairs on orders from O'Shea (597-606); and (10) Detective Jacques Serroen, who helped move petitioner upstairs (608-609).

Throughout the ceaseless interrogation, petitioner denied complicity in the crime. Without food, sleep, or the advice of friend or counsel, he resisted throughout the night all attempts to force him to confess, until at 7:45 a.m. Cummings told him that Closter had been apprehended and had confessed (689-692).

Thus, petitioner, only eighteen years old at the time (see Haley v. Ohio, 332 U.S. 596 (1948)), was subjected to the kinds of coercion which have been repeatedly condemned by the Supreme Court and by this Court: questioning by teams of interrogators (Watts v. Indiana, 338 U.S. 49, 52 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1948); Chambers v. Florida, 309 U.S. 227 (1940); see also United States ex rel. Clayton v. Mancusi, 326 F.Supp. 1366 (E.D.N.Y. 1971)); the denial of sleep (Spano v. New York, 360 U.S. 315 (1959); Davis v. North Carolina, 384 U.S. 737 (1966); United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir.), cert. denied, 350 U.S. 896 (1955); see also United States ex rel. Clayton v. Mancusi, supra); and the denial

of food (Clewis v. Texas, 386 U.S. 707 (1967)). Aggravating the coercive conditions of petitioner's interrogation was the fact that petitioner was never advised of his Fifth Amendment rights. Although this case preceded Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court, in Johnson v. New Jersey, 384 U.S. 719 (1966), and Davis v. North Carolina, supra, 384 U.S. 737, held that this failure to advise of rights was a significant factor in determining the voluntariness of a confession under the totality of the circumstances test.

Moreover, throughout the entire night of petitioner's interrogation, there were three Nassau County assistant district attorneys present at the police station. They were not made available to the defendants for advice, nor did they suggest that petitioner be allowed to telephone a lawyer, nor even, when face to face with petitioner, advise him of his constitutional rights.

The participation of the prosecuting attorney in the prolongation of interrogation, in the relay questioning, and in the denial of rights and warnings, is a crucial element in the pattern of psychological coercion. Watts v. Indiana, supra; Chambers v. Florida, supra; Spano v. New York, supra; United States ex rel. Weinstein v. Fay, 333 F.2d 815 (2d Cir. 1964).

During the first several hours of interrogation, the detectives questioned petitioner because they considered him a prime suspect, his car having been identified as the likely getaway vehicle. In the course of the early morning hours,

however, the detectives learned all the facts of petitioner's participation in the crime from Closter, Willie Brittain (Moll's friend), and Moll himself.* Thus, although the detectives no longer needed "information" from petitioner in order to determine whether he was involved in the crime, they persisted in their interrogation in order to force a confession. This kind of coercion has been specifically condemned by the Supreme Court:

...The police were not therefore merely trying to solve a crime or even to absolve a suspect.... They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny....

Spano v. New York, supra,
360 U.S. at 323-324.

Another factor in assessing the totality of the circumstances of petitioner's confession is his claim that he was severely beaten throughout the night. During petitioner's motion at trial to suppress his confession as involuntary, and during the later Huntley hearing, numerous detectives and Nassau County Jail officials (petitioner was taken to jail following his arraignment on March 23, 1961) took the witness stand to deny that petitioner was physically or verbally abused. Fol-

*See the brief filed by the Nassau County District Attorney in 1968 in opposition to petitioner's petition for writ of certiorari to the Supreme Court, at 20.

lowing the Huntley hearing, Judge Gulotta chose to credit the truth of the detectives' denials. Despite that ruling, however, this Court should not be so naive as to believe that the detectives, outraged at the killing of a fellow police officer, did not use forceful means to extract a confession. In addition to the undisputed facts -- a late night to early morning interrogation of a youth deprived of sleep, food, and the advice of counsel -- this Court should consider carefully the likelihood that petitioner was physically and verbally abused:

... What actually happens to them behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. The prisoner knows this -- knows that no friendly or disinterested witness is present -- and the knowledge may itself induce fear. But, in any case, the risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.

Culombe v. Connecticut, 367
U.S. 568, 573-575 (1961).
Footnotes omitted.

Thus, the indisputed facts, as well as the likelihood of violence used against petitioner, reveal a classic pattern of police coercion resulting in an involuntary confession:

... Petitioner was questioned for virtually

eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances, slowly mounting fatigue does, and is calculated to, play its part.

Spano v. New York, supra,
360 U.S. at 322.

The totality of coercive circumstances in this case rendered petitioner's confession involuntary.

III

PETITIONER WAS ARRESTED ON LESS THAN PROBABLE CAUSE. HIS CONFESSION, THEREFORE, WAS INADMISSIBLE INTO EVIDENCE AS THE FRUIT OF AN ILLEGAL ARREST.

The evidence established that the getaway car, a customized 1955 green Chevrolet hotrod with "For Sale" signs in both rear windows, was the primary lead pursued by the large team of detectives assigned to find the three men involved in the robbery and shooting. Investigation led Detectives Daniel Cavanaugh, Leo Ferrandiz, and Gerald Higgins to a local teenager, Robert Collins, who possessed a similar car (H:548). Collins told the detectives he knew someone, later identified as petitioner, whose car was similar to the suspected getaway vehicle (H:548-551). Collins, in the company of his father, Hugh Collins, then a New York City homicide detective cooperating with the Nassau County detectives to clear his son of suspicion (H:511-544), led the detectives to petitioner's house at about 11:30 p.m. on March 22, 1961 (H:553). Acting on orders from Ferrandiz, Collins motioned petitioner, who was standing at a window, to come down (H:554). Soon petitioner emerged from his house, was met on the street by the three detectives, frisked, and put into a car with the three detectives. Collins and his father were in their own car.

According to Ferrandiz, petitioner "agreed" to accompany the detectives (559). Petitioner, on the other hand, claimed

he was physically forced into the rear seat of the police car (H:55). Regardless of which version of petitioner's seizure is believed, though, it is clear that petitioner was under restraint without freedom to leave. Even Ferrandiz, who maintained that petitioner "agreed" to go to the station house, admitted that had he not agreed petitioner would have been taken into custody forcibly (560).

Once in the car, petitioner was ordered to direct the detectives to his green hotrod (H:57, H:408). After a short ride, petitioner took the agents to his car, which was parked at a private garage. The keys were then taken from petitioner and the car examined and seized (H:58, H:408-413). Thereupon Higgins and Ferrandiz took petitioner to the Roslyn station house while Cavanaugh followed in petitioner's car. Petitioner was taken into the precinct house at about 12:30 to 1:00 a.m. (H:414-416).

In the station house petitioner was questioned continuously from 12:30 a.m. until 8:00 a.m., when he finally confessed. This confession was the principal evidence against him at the trial. At no time during the proceedings has the State alleged that there was probable cause to detain and interrogate petitioner.* Probable cause could not have existed because the detectives had a description of the getaway car but no description of the three robbers. Investigation of the identity of

*Petitioner was not formally "arrested" until after he confessed.

the car led to the Collins youth, who said that he got the green paint for his hotrod from petitioner. The detectives then had young Collins lead them to petitioner's house. With only this information, petitioner was detained and interrogated.

Although the State maintains that petitioner was not under arrest until after his confession was taken, it is clear that he was under arrest or otherwise deprived of his freedom from the moment he was seized on the street in front of his house. Since the seizure and interrogation were conducted without probable cause, petitioner's confession, a fruit of the improper detention, should not have been allowed into evidence. Wong Sun v. United States, 371 U.S. 471 (1963).

The issue of when a person is actually under arrest so as to be entitled to constitutional protection was left unresolved by the Supreme Court in Morales v. New York, 396 U.S. 102 (1969). There, Morales went to his mother's place of business after his mother had told him by telephone that the police wanted to speak to him. Morales appeared, was taken into custody, and confessed fifteen minutes later to the crime. The Court stated that this kind of detention, custody on less than probable cause, clearly went beyond the exceptions to the probable cause requirement recognized in Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968). The Court, however, refused to decide whether Morales had been improperly detained and questioned. Rather, the matter was remanded for a hearing on whether the police had more cause to arrest Morales than appeared

on the record. Id., at 105.

Here, unlike Morales, the facts are clear and indicate that petitioner was under arrest, regardless of whether the issue of arrest is controlled by State or Federal law. See United States v. Tramontana, 460 F.2d 464, 466 fn.1 (2d Cir. 1972). The facts of petitioner's detention are undisputed: seizure of his person without probable cause followed by intense interrogation from the time of his seizure until his confession eight hours later. Based on these facts, this Court must find that petitioner's confession was the product of an illegal arrest.

IV

PETITIONER'S CAR WAS SEIZED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS. IT WAS ERROR TO ADMIT INTO EVIDENCE PHOTOGRAPHS OF THE CAR AND THE BLOOD-STAINED REAR SEAT OF THE CAR.

Petitioner was taken into custody in front of his home at approximately 11:30 p.m. on the day of the robbery, and ordered to get into the arresting officers' police car (562). There was no warrant for his arrest, nor was there any warrant to seize any of his possessions (559). There was one automobile parked in front of his house, but the arresting officers were not interested in it.

Petitioner was then driven several blocks to the garage where his green 1955 Chevrolet was parked. One of the arresting detectives then seized the car keys and, without a warrant, seized the automobile and drove it from Queens back to the Roslyn, Long Island, police station.

At trial, and over defense objection, several photographs of the automobile were admitted into evidence and identified by a witness as the car which he had seen near the supermarket parking lot the night of the robbery (1705, 1709, 1711, 1713). That identification constituted the only evidence, other than the challenged confessions, which established petitioner's presence at the scene of the crime. In addition, the blood-stained back seat was admitted into evidence.

The warrantless seizure of his automobile violated peti-

tioner's Fourth Amendment rights. Mapp v. Ohio, 367 U.S. 643 (1961). Absent from the seizure of petitioner's car were "exigent circumstances" such as to justify an exception to the warrant requirement. Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev. 835 (1974). Petitioner's car was not stopped on a highway while the officers had probable cause to believe a crime was currently being committed (Carroll v. United States, 267 U.S. 132 (1925)); petitioner was not seized in his car following the commission of a crime while the officers had probable cause to believe he was fleeing the scene of a crime (Chambers v. Maroney, 399 U.S. 42 (1970)); petitioner's car was not searched pursuant to a statute for forfeiture sale required by the commission of a narcotics offense (Cooper v. California, 386 U.S. 558 (1967)); petitioner's car was not searched pursuant to an administrative regulation for cars in police custody (Harris v. United States, 390 U.S. 234 (1968); Cady v. Dombrowski, 413 U.S. 266 (1973)); nor was petitioner's car subjected to merely an exterior examination (Cardwell v. Lewis, 94 S.Ct. 2464 (1974)).

Thus, there was no justification for the detectives' failure to obtain a warrant to seize petitioner's car, petitioner being in custody and the car parked safely in a private garage with the detectives in possession of its keys. Furthermore, the introduction into evidence of photographs of the car and of the back seat was not harmless error. (See Judge Mishler's Memorandum and Order, July 30, 1973, at 9). This was the only

evidence other than the hotly contested confessions placing petitioner at the scene of the crime.

The jury was charged (1605-1608) that petitioner challenged the voluntariness, and hence the truth, of his confession. Viewing the photographs of the car and the rear seat of the car must have influenced the jury into crediting the legitimacy of the confessions since the car was the key factor linking petitioner to the crime.

CONCLUSION

For the foregoing reasons, the judgment of conviction must be reversed and petitioner released from custody.

Respectfully submitted,

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January 15, 1975

Certificate of Service

January 15, 1975

I certify that a copy of this breif for appellee, cross-appellant has been served by mail on the office of the Attorney General of the State of New York.

William G. Epstein